

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION SIX**

DUQUESNE UNIVERSITY OF THE HOLY
SPIRIT,

Employer,

and

UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION,
AFL-CIO, CLC,

Petitioner.

Case No. 06-RC-080933

**DUQUESNE UNIVERSITY OF THE HOLY SPIRIT'S REQUEST FOR REVIEW OF
THE REGIONAL DIRECTOR'S DECISION AND RECOMMENDATION TO
OVERRULE OBJECTION TO ELECTION AND ISSUE CERTIFICATION**

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STATEMENT OF THE CASE

Pursuant to Section 102.67(b) and (c) of the National Labor Relations Board Rules and Regulations and the June 5, 2015 Decision and Recommendation to Overrule Objection to Election and Issue Certification by Region 6 in this matter (the “June 5 Order”), Duquesne University of the Holy Spirit (“Duquesne” or the “University”), by its attorneys, Hogan Lovells US LLP and Glankler Brown, PLC, hereby requests review of the June 5 Order. The Board should grant review because the Region’s decision departed from the Board’s decision in *Pacific Lutheran University*, 361 NLRB No. 157 (Dec. 16, 2014) (“*PLU*”), affirmed erroneous, prejudicial evidentiary rulings, and is grounded in prejudicial clearly erroneous factual findings. See 29 C.F.R. § 102.67(c)(1)–(3). The Board should also grant review because the record in this case demonstrates that *PLU* involves the same unconstitutional inquiry as its substantial religious character test predecessor and should be abandoned. *Id.* § 102.67(c)(4).

SUMMARY OF ARGUMENT

Duquesne University of the Holy Spirit is a Catholic, Spiritan university, founded and still ultimately controlled by priests and brothers of the Congregation of the Holy Spirit (“Spiritans”). Duquesne is deeply committed to the Catholic Church’s teachings on labor and to providing its workers fair wages and just treatment. This case is not about Catholic social teaching. This case is about whether the National Labor Relations Board (“Board” or “NLRB”) may assert jurisdiction and thereby insert itself between the Congregation of the Holy Spirit—which retains exclusive ultimate authority over Duquesne’s Catholic, Spiritan mission and philosophy—and a group of faculty crucial to achieving that mission. In *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), the United States Supreme Court ruled that the

National Labor Relations Act (“NLRA”) does not cover teachers at church-operated schools. Applying *Catholic Bishop*, the NLRB has no jurisdiction over Duquesne.

In *Pacific Lutheran University*, 361 NLRB No. 157 (Dec. 16, 2014) (“*PLU*”), a Board majority announced a new two-prong test for determining whether *Catholic Bishop* applies. Under that test the Board has no jurisdiction when an institution (1) holds itself out as providing a religious educational environment; and (2) holds out petitioned-for unit employees as performing a specific role in creating or maintaining that environment. The new test perpetuates the unconstitutional entanglement of its “substantial religious character” predecessor by licensing the Board to determine (or assume) what is or is not a “religious function” and then to judge whether the institution sufficiently holds out its faculty members as performing that function. Duquesne asks the Board to avoid entangling itself in the University’s religious beliefs by assessing jurisdiction under the Constitutional test articulated by the United States Court of Appeals for the District of Columbia Circuit in *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002) and reaffirmed in *Carroll College, Inc. v. NLRB*, 558 F.3d 568 (D.C. Cir. 2009).

However, even applying *PLU*, the Board has no jurisdiction here. There is no dispute that Duquesne holds itself out as providing a religious educational environment. Duquesne also holds out that its faculty¹ “serve God by serving students” and are indispensable if Duquesne is to achieve its Catholic, Spiritan mission. Moreover, Duquesne holds out that its Catholic, Spiritan mission affects the terms and conditions of faculty employment: it factors in hiring decisions; faculty deliver curricula designed to further the mission in a religious environment, which includes a crucifix in every classroom; academic freedom is subject to the mission; and

¹ A reference to “faculty” in this brief includes all adjunct faculty unless otherwise specified.

the University may terminate or decline to rehire faculty for trampling it. To assert jurisdiction here would result in the very entanglement the *Catholic Bishop* decision exists to avoid.

The Region asserted jurisdiction in the June 5 Order. That decision is based on a misunderstanding and misapplication of *PLU* and clearly erroneous fact-finding. Where the *PLU* inquiry is supposed to begin and end with an institution's own representations, the Region ignored altogether or discounted Duquesne's representations about the adjunct faculty role and instead demanded "specific substantial evidence" of particular instances involving particular adjunct faculty members. For instance, although the Region conceded Duquesne's definition of academic freedom is subject to its Catholic, Spiritan mission, the Region ignored that principle because Duquesne did not describe specific instances of faculty violations of it. The record in this case and the June 5 Order also demonstrate why the Board should abandon *PLU*.

PROCEDURAL HISTORY

The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC ("Union" or "Steelworkers") filed a petition on May 14, 2012 seeking to represent a unit of all part-time adjunct faculty employed in Duquesne's McAnulty College and Graduate School of Liberal Arts ("McAnulty College") located in Pittsburgh, Pennsylvania. The bargaining unit therefore would include professors who teach a wide range of liberal arts subjects, including theology, Catholic theology, philosophy, ethics, science, history, and literature, just to name a few. *See* Er. Ex. 65 at 2010-11 Catalog, 60.² On June 14, 2012, Duquesne moved to withdraw from a stipulated election agreement because it is not subject to the Board's jurisdiction under *Catholic Bishop*. The Region denied the motion, and Duquesne appealed to the Board.

² Citations to Employer Exhibits are abbreviated "Er. Ex."

On appeal, the parties briefed whether Duquesne had waived its challenge to jurisdiction by entering into the stipulated election agreement. *E.g.*, Tr. 161. On December 16, 2014, the Board decided *PLU*. By order dated February 12, 2015, the Board remanded this case to the Region for proceedings consistent with *PLU*. The Region held a hearing on April 27–29, 2015. The hearing focused exclusively on whether the NLRB has jurisdiction over Duquesne under *Catholic Bishop* and *PLU*. *See* Tr. 9, 162, 166–67.

In the June 5 Order, the Region concluded that (1) Duquesne holds itself out as providing a religious educational environment, but that (2) Duquesne does not hold out petitioned-for unit employees as performing a specific role in creating or maintaining that environment.

RELEVANT FACTS

I. Duquesne is a Catholic University, Ultimately Controlled by the Congregation of the Holy Spirit.

Spiritans founded Duquesne in 1878 to serve poor, often Catholic, Irish and German immigrants. *See* Tr. 22. Duquesne’s legal name is “Duquesne University of the Holy Spirit”, and its motto is “It is the Spirit Who Gives Life.” Tr. 22–23. The Holy Spirit is one component of the Catholic conception of God—the Trinity, and the University’s motto is taken from the Nicene Creed, in which Catholics affirm the Holy Spirit as “Lord, the giver of life.” Tr. 23. Today Duquesne remains a Catholic, Spiritan university. It is organized as a nonprofit Pennsylvania membership corporation, Tr. 23, 29; Er. Ex. 2 (Articles of Incorporation); Er. Ex. 3 (Bylaws).³ And it is accredited by the Middle States Commission on Higher Education (“MSCHE”). Tr. 337.

³ The Parties also stipulated that Duquesne is a nonprofit corporation. Tr. 8. *Accord* Er. Ex. 2, art. II (“The University is organized, and shall be operated, exclusively for religious, charitable, scientific, literary and educational purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code of 1986, as amended or the corresponding provision of any future United States Internal Revenue Law.”); Tr. 201.

As a membership corporation, Duquesne’s corporate Members retain exclusive, reserved powers as set forth in Duquesne’s Articles of Incorporation and Bylaws (both available on the University’s website). Tr. 29, 32, 35; *see* Er. Ex. 2; Er. Ex. 3. Only vowed Spiritan priests and brothers in good standing can serve as Duquesne’s Members. Tr. 32; Er. Ex. 2, art. VII; Er. Ex. 3 art. III. A Provincial Superior governs the Spiritans in the United States and appoints the Spiritans who serve as Members of the corporation. Tr. 357–58; Er. Ex. 2, art. VII.

The Members have eleven “fundamental,” reserved powers. *See* Tr. at 32; Er. Ex. 2, arts. VIII, IX; Er. Ex. 3, art. 4. The Members’ “full and exclusive reserved powers” include the power to elect or remove any member of the Board of Directors; to amend, alter, modify or repeal the Articles of Incorporation or the Bylaws; and to dissolve the University. *See id.* The Members also have exclusive authority to “determine or change the mission, the philosophy, objectives or purpose of the University” and to “issue to the Board, from time to time, a statement of policy concerning the philosophy and mission of the University.” *Id.* In sum, the Members—all vowed Spiritan priests and brothers—retain ultimate control over the University, including exclusive control over the Catholic, Spiritan mission, philosophy, and objectives of the University. *See id.*

Duquesne is a Catholic university, officially recognized by the local Bishop and listed in the *Official Catholic Directory*. Tr. at 42–44; Er. Ex. 4 (Official Catholic Directory Excerpt). The Catholic Church is a hierarchical church. *See* Tr. at 45. As a Catholic university, Duquesne is dependent on the local Bishop for recognition. Tr. 42. The Bishop or the Bishop’s designee has an *ex officio* seat on Duquesne’s Board of Trustees, and Duquesne cultivates its relationship with the Bishop. Tr. 41–42; Er. Ex. 3, art. VI, § 6.2. As President Charles Dougherty testified,

Duquesne's "teaching, research and student life function are consistent with the teachings of the Catholic church." Tr. 42.

Duquesne is also subject to the guidelines the Church has handed down for universities: *Ex Corde Ecclesiae* ("Ex Corde"), given by Saint Pope John Paul II in 1990, and the Application of *Ex Corde Ecclesiae* for the United States ("USCBB Application"), promulgated by the U.S. Conference of Catholic Bishops in 2000. See Tr. at 45–50; Er. Ex. 5 (*Ex Corde*); Er. Ex. 6 (USCCB Application); Er. Exs. 7, 7(a) (letter to Bishop David Zubik of the Diocese of Pittsburgh enclosing report regarding compliance with USCCB Application); Er. Ex. 8 (letter regarding compliance with Mandatum requirement for theology faculty); Er. Ex. 32 at 8 (brochure titled "Duquesne University: A Catholic University in the Spiritan Tradition" and containing the text of Duquesne's Board of Directors' handbook, Tr. 222, which states: "Duquesne University also affirms its complete adherence to the teachings of *Ex Corde Ecclesiae* . . ."). Duquesne links to *Ex Corde* on its website. Tr. 69–70. Translated, *Ex Corde Ecclesiae* means "From the Heart of the Church," which points to Catholic universities' "particularly close relationship to the church." Tr. 47.

Ex Corde and the USCCB Application proclaim that Catholic universities contribute to the work of the Catholic Church by uniting two orders of reality that "too frequently tend to be placed in opposition as though they were antithetical"—faith and reason. See Er. Ex. 5, Introduction. Rather, because God is the ground of all existence, there can be no real inconsistency between faith and reason. See *id.* Introduction, § 4; *accord* Tr. 48. Therefore, it is the "responsibility of a Catholic University to consecrate itself without reserve to the cause of truth. This is its way of serving at one and the same time both the dignity of man and the good of the Church, which has 'an intimate conviction that truth is (its) real ally . . . and that knowledge

and reason are sure ministers to faith’(7).” Er. Ex. 5, Introduction § 4. “[E]ach Catholic University makes an important contribution to the Church’s work of evangelization,” and “all the . . . academic activities of a Catholic University are connected with and in harmony with the evangelizing mission of the church” *Id.* §§ 4, 49.

Thus, the Catholic Church teaches and Duquesne holds out that the work of the University—including academic work in secular disciplines—is the work of the Church and contributes to the Church’s mission of evangelization. *See id.*; *see also id.* §§ 7, 10; *id.* Part I, §§ 14–15. Consistent with the Church’s view that faith and reason are “‘sure ministers to faith’” and that all individuals are children of God entitled to freedom of conscience, *Ex Corde* and the USCCB Application require academic freedom and responsibility, encourage ecumenism, and discourage proselytizing. *E.g.*, Tr. 56, 59–60, 67; Er. Ex. 5, Part I, §§ 22, 29; Er. Ex. 6, Part 2, art. 2, §§ 3–4; *id.* n.27. Catholic universities are to invite everyone to the faith, but to coerce no one. *See id.* However, academic freedom and ecumenism do not mean anything goes: “all professors are expected to be aware of and committed to the Catholic mission and identity of their institutions” and to demonstrate “respect for Catholic doctrine.” Er. Ex. 6, Part 2, art. 4, § 4(a)–(b); *accord* Er. Ex. 5, Part II, art. 4, § 2.

II. Duquesne’s Religious Educational Environment.

Ex Corde and the USCCB Application are the most basic documents that hold out Duquesne’s religious educational environment. *E.g.*, Tr. 69–70 (Duquesne’s website links to *Ex Corde*). The record contains much more, starting with Duquesne’s mission statement. Duquesne’s mission is well-publicized on its website and elsewhere. Distinctively Catholic and Spiritan, it reads:

Duquesne University of the Holy Spirit is a Catholic university founded by members of the Congregation of the Holy Spirit, the Spiritans, and

sustained through a partnership of laity and religious. Duquesne serves God by serving students through:

- Commitment to excellence in liberal and professional education;
- Profound concern for moral and spiritual values;
- Maintaining an ecumenical atmosphere open to diversity;
- Service to the Church, the community, the nation, and the world;
- Attentiveness to global concerns.

See, e.g., Er. Ex. 1 (mission and identity webpage); *accord* Er. Ex. 11 (student handbook); Union Ex. 9 (faculty handbook); Er. Ex. 32 (brochure containing Board of Directors handbook text). Thus, consistent with *Ex Corde* and the USCCB Application, the mission seeks to unite academic excellence, moral and spiritual values, and service to the Church in an ecumenical environment. *See* Er. Ex. 31; *Compare* Er. Ex. 1, *with* Er. Ex. 5 (*Ex Corde*), *and* Er. Ex. 6 (USCCB Application).

The mission is also distinctly Spiritan. Duquesne's website explains that the Congregation of the Holy Spirit's charism is to evangelize the poor, with a preference for those who have "not yet heard the Gospel message or those who have scarcely heard it." Tr. at 358–61; Er. Ex. 50 (Duquesne webpage titled "The World of Spiritans"). For Spiritans, "[e]ducation, both formal and informal, is an integral part of our mission of evangelization." Er. Ex. 50; *accord* Tr. at 360–61 (explaining that this principle is applicable to Duquesne today because "too few students" have "authentically heard the Gospel"). Duquesne's mission and goals also link directly to the Spiritan Rule of Life. *See, e.g.*, Er. Ex. 32 at 5–13 (linking goal of academic excellence to the Spiritan Rule of Life and service to the Church). All members of the Duquesne community share in the Spiritan charism, including adjunct faculty. Tr. 361. Father James McCloskey, a former Spiritan Provincial Superior and current Member of the corporation,

testified that the “religious mission of the university is vitally important, its mission as Catholic and Spiritan, to me, and to members of the corporation.” Tr. 363; *see also* Er. Ex. 32 (“Numerous ideas and proposed actions have been rejected because they were not in keeping with the Mission and Goals of the University”).

Duquesne’s Catholic, Spiritan mission expresses itself in many ways, including the presence of Spiritan priests and ubiquitous Catholic symbols. *See, e.g.*, Tr. 85 –86, 92 –93; Er. Exs. 9, 10, 25. The cabinet-level Vice President for Mission and Identity serves *ex officio* on the Board of Directors. *See, e.g.*, Er. Ex. 3, art. 6, § 6.2. Each of the University’s strategic plans prioritizes achieving the Catholic, Spiritan mission as the first area of focus. *E.g.*, Tr. 143; Er. Ex. 18 (2003–2008 Strategic Plan); Er. Ex. 19 (2010–2013 Strategic Plan). In the words of the most recent strategic plan: “Our extraordinary and pervasive sense of MISSION as a Spiritan Catholic university will be the guide for all Duquesne University does.” Er. Ex. 19 at 6.

The *Code of Student Rights, Responsibilities and Conduct 2014–2015* opens with a letter from President Dougherty encouraging students to “[a]ttend religious services and programs” and to “[s]erve God by serving others,” and explaining that “Duquesne faculty, staff, and administrators believe that the education you receive here is not only for your mind, but for your heart and Spirit.” Er. Ex. 11 at 1. “The whole Duquesne family is concerned with your academic, moral, and spiritual growth.” *Id.* Duquesne’s student expectations include: “[g]row spiritually, preparing for life, not just a career” and “[b]e at peace with God and with yourself.” *Id.* at 4. The University reserves the right to refuse recognition to student organizations that are not in accordance with the “Mission and Expectations of the University,” such as a club to promote atheism. *See* Er. Ex. 11 at 10; Tr. 99; Er. Ex. 15 at 3.

A report to Bishop David Zubik of the Diocese of Pittsburgh on Duquesne's compliance with the USCCB Application captured "highlights" of the implementation of Duquesne's Catholic, Spiritan mission. Tr. 73; Er. Ex. 7 at Encl. For example, Duquesne offers daily celebration of Catholic sacraments, service programs, alternative spring break trips, faith formation and retreat programs, and mission-related academic centers and institutes, endowed chairs, and conferences and symposia. *Id.*; *see also* Tr. 73–78 (President Dougherty testifying that all faculty are invited to attend events such as Bible studies, Libermann Lunch talks about Spiritan issues, and service trips with prayer components). Each year Duquesne celebrates "Founders Week" to focus the entire community on the University's Spiritan nature. Er. Ex. 7 at Enclosure; *see also* Tr. at 229–30; Er. Ex. 30 (describing the February 2015 Founders Week activities). The report noted "[m]ission orientation programs for faculty, staff, administrators and students." Er. Ex. 7 at Enclosure. It concluded that Duquesne is "[d]eeply committed to the founding vision . . . as Catholic and Spiritan, the university attempts to build a culture of faith and service—in its classrooms and residence halls, among its alumni and friends, and for the wider Church of the Diocese of Pittsburgh and the world." *Id.* "[R]everence for the Catholic Intellectual Tradition—and attempts to inform the curriculum and form faculty and students in this tradition—are strong." *Id.*

The Catholic, Spiritan mission is critical to Duquesne's portrayal of itself to the world. *See* Tr. 208–11 (testimony of Vice President for University Advancement responsible for University communications and fundraising). Duquesne publishes its mission "broadly" and "across all platforms," including student and faculty recruitment and alumni giving. *Id.*; *e.g.*, Tr. 211–12, 215–16, 222–23; Er. Exs. 22–24, 26; *id.* Er. Ex. 23 at 10 (major student recruitment

piece holding out that “[f]aculty, administrators and staff aspire to ‘serve God by serving students’ so they in turn can serve others”); Er. Ex. 27 at 33.

As for faculty recruitment, the University’s recruitment brochures and website emphasizes its Catholic, Spiritan mission. *E.g.*, Tr. 236; Er. Ex. 33 (human resources recruitment brochure highlighting that “[o]ur employees contribute to our vision of enhancing our culture of academic excellence dedicated to our mission of serving God by serving students, led by a profound concern for moral and spiritual values in an atmosphere that welcomes all and excludes none.”); Er. Ex. 34 (website welcome letter from human resources director stating “[a]pplicants must be willing to contribute actively to the mission and to respect the Spiritan Catholic identity of Duquesne University.”).

III. Role of Duquesne’s Adjunct Faculty in Creating or Maintaining its Religious Educational Environment.

Precisely because Duquesne is Catholic, it welcomes diversity, encourages professional academic autonomy and free pursuit of the truth, and imposes no requirement that faculty indoctrinate students or participate in Catholic sacraments.⁴ In countless ways, Duquesne holds out to current and prospective faculty their important role in Duquesne’s Catholic, Spiritan mission. Duquesne (a) proclaims that faculty serve its Catholic, Spiritan mission; (b) designs curricula around it and encourages and rewards faculty who embrace it; (c) factors it in hiring; (d) orients new faculty to it; and (e) defines terms and conditions of employment, including academic freedom, as subject to it.

⁴ The Board must understand that it is contrary to Catholic teaching to force faculty to advocate Catholicism or religion in general in their classrooms. Thus, while the University invites and indeed strongly encourages faculty to bring faith into their classroom in whatever subject they teach, and provides the tools to do so through programs such as the Center for the Catholic Intellectual Tradition, the University does not compel faculty to proselytize on behalf of the Catholic or any other religion. *See* Er. Exs. 5–6; *supra* pp. 5–7. The Board states in *PLU* that proselytizing is not required to meet its two-part test. *PLU*, 361 NLRB No. 157 at *12 n.14.

A. Duquesne Proclaims that Faculty Serve Its Catholic, Spiritan Mission.

Duquesne consistently proclaims through events and communications that its faculty and academic endeavors are integral to its Catholic, Spiritan mission. *E.g., supra* pp. 4–12. Duquesne’s academic year starts with two such events to which all faculty are invited: the Mass of the Holy Spirit and Convocation. The Mass of the Holy Spirit is the largest Mass in the Diocese. The Bishop presides, and the Mass opens the new academic year. *See* Tr. 81, 88–89; Er. Ex. 7, Enclosure at 2.

Academic convocation is an annual “major academic meeting,” which also is typically held near the start of the year. Tr. 108. Duquesne’s president gives a “major speech on issues facing the university.” Tr. 86, 108. “And, all members of the university community are invited to attend, with special emphasis on the faculty, including the adjunct faculty.” Tr. 109, 201. Each of the president’s convocation speeches is distributed to all faculty, Tr. 195, is currently published on the University’s website, and addresses the University’s religious mission. Tr. 109. The following excerpts show how the University President holds out the role of faculty in Duquesne’s Catholic, Spiritan mission at an important University academic meeting:

- *2010 Academic Convocation.* “Our core religious faith is Catholic, carried in a special way for us by our Spiritan sponsors. This means there will be moments when concerns that are especially Catholic will have to dominate—in health care coverage, in some hiring, in the curriculum, for example.” Er. Ex. 13 at 3.
- *2011 Academic Convocation.* “[O]f all the things that unite us, the most important is our purpose for being here . . . our mission” Er. Ex. 14 at 1. “We are a university. We teach. We conduct research. We contribute service. All of these activities are suffused with our overarching-self-understanding that we are serving God by serving students.”

Id. at 3. President Dougherty details that the Church teaches that faith and reason are “ultimately compatible.” *Id.* at 9. “Our belief, beyond full understanding, is that God is at once a loving Creator, a self-sacrificing Redeemer, and a Spirit that guides our lives. As a Catholic university, we must remain true to these beliefs even as our understandings of them—and our rational knowledge of the world—evolve.” *Id.* at 9. As President Dougherty testified, “we” comprises the entire University community, including adjunct faculty. Tr. 116.

- *2012 Academic Convocation.* President Dougherty explains that the University’s Catholic, Spiritan mission—“we serve God by serving students”—distinguishes Duquesne from other universities. “We serve God by serving students. This is a phrase we repeat to ourselves as a reminder of the overarching goal of Duquesne University and all of our individual efforts. It is the ultimate context for what we do together.” Er. Ex. 15 at 3. Service to students is “true of virtually all universities,” but Duquesne’s “motivation for service is far deeper.” *Id.* The “goal for us” is “service to students as a means of serving God.” *Id.* “[T]he link between serving God and serving students is a close one” that lies “in our tradition’s foundational assumption that each human being is endowed with human dignity by God.” “[E]ach of our students’ dignity is the spark of the Holy Spirit within them. Our service to God is reverence to the Holy Spirit in the life of every one of our students.” *Id.* at 4. “Our service to students is primarily educational,” and that role is “most clear in the case of faculty.” *Id.* at 6.
- *2013 Academic Convocation.* The University’s strategic plan is “organized to draw attention to the fact that the heart of what we are is a trinity involving students, faculty and a mission that binds them together. To put it in more dramatic terms, who we are at

our core is best illustrated when one faculty member assists one student to grow in knowledge and maturity within a Catholic, Spiritan context. The academic commitment at the core of this trinity has been part of the Spiritan tradition since the very beginning.” Er. Ex. 16 at 1. President Dougherty specifically thanks “all those in Academic Affairs,” including the “faculty” in particular, because “[y]ou are a critical part of the trinity at the heart of who we are as you bring our students an education for a lifetime in our Catholic, Spiritan tradition. You serve God by serving our students.” *Id.* at 17.

Other communications from President Dougherty similarly emphasize the faculty’s critical role in the Catholic, Spiritan mission. *See, e.g.*, Tr. 151–153; Er. Ex. 20 at 1 (letter addressing this litigation posted to Duquesne website and explaining that “in the case of faculty who are central to the core of who and what we are,” our religious mission is paramount); Er. Ex. 21 (President Dougherty’s retirement message, thanking all faculty because “[o]ur mission is vibrant, alive and woven into every aspect of life at Duquesne”).

The record is full of other ways the University communicates the same basic message. Faculty and staff can attend alternative spring break service trips described as a “journey of faith” where participants “overcom[e] fear and doubt to answer God’s call.” Er. Ex. 29 (describing such trips); *see, e.g.*, Tr. at 227–28 (faculty invited to attend). Bishop Zubik made a pastoral visit in 2011 specifically to the faculty to address a papal encyclical. Tr. 365–67; *see* Er. Ex. 51 (Mission Advisory Committee Meeting Minutes describing plans for faculty reading groups of the encyclical). The University invited all faculty to attend, and “several hundred” did. Tr. 366.

B. Duquesne Designs Curricula to Achieve Its Catholic, Spiritan Mission, and Encourages and Rewards Faculty Who Embrace It.

The faculty are responsible for delivering the curricula, Tr. 329, which is one area in which “concerns that are especially Catholic” must “dominate,” Tr. 120; Er. Ex. 13 at 3. Duquesne has structured curricula to implement its Catholic, Spiritan mission. The focus is most obvious in Catholic theology, where the University works with the local diocese so that the Bishop will give professors teaching in that subject a Mandatum, which recognizes the professor’s commitment and responsibility to teach authentic Catholic doctrine. *See* Er. Ex. 6, Part II, art. IV, § 4(e); Er. Ex. 8; *see also* Tr. 55. However, the influence of the University’s mission on the curriculum extends well beyond theology.

The University has developed and publishes on its website a document titled “Dimensions of a Duquesne University Education” (the “Dimensions”). Er. Ex. 46 (Dimensions); *see* Tr. 327–33. “All active [academic] programs, graduate and undergraduate, use the Duquesne dimensions to link their curriculum and student learning outcomes with the mission of the University.” Tr. 328. One of the Dimensions is “Ethical, Moral, and Spiritual Development.” Er. Ex. 46. Its “academic components” include: “Recognize the importance of faith and spiritual values; [a]pply ethical, moral and spiritual principles in making decisions and interacting with others.” *Id.* Another Dimension is “Leadership and Service.” Its “academic components” include: “[u]nderstand the moral and ethical framework necessary to be a just leader.” *Id.* The faculty are responsible for delivering academic programs and for achieving these dimensions in the curriculum. Tr. 329–30.⁵

All undergraduates must complete a “Core Curriculum” (“Core”). Tr. 332. Developed by a group of Duquesne faculty, Tr. 335, the Core “uniquely expresses the Spiritan-Catholic

⁵ The University’s philosophy department teaches all diocesan seminarians as part of its generally available academic programs. *See* Tr. 82.

identity of Duquesne University.” Er. Ex. 47 (Core Curriculum Website Page); *see also* Tr. 87–88. The vision is education that “informs the mind, engages the heart, and invigorates the spirit,” and that vision takes its inspiration from the University’s mission, including “concern for moral and spiritual values.” Er. Ex. 47. The Core Curriculum’s “educational values” include “[s]piritual and moral development and ecumenical openness that fosters inter-religious understanding.” *Id.* Students must take three credits in theology and three credits in ethics. Tr. 336. The Academic Core Founding Document identifies “general goals and student learning outcomes,” such as to “[c]omprehend fundamental human questions through the study of selected texts and figures in philosophy and theology;” “[e]xplain how religion can inform personal, societal, and professional life through study of and reflection on theological sources and questions;” “[i]dentify some of the unique perspectives provided by faith and reason in the pursuit of truth;” and “[l]ink academic theory and community-based practice through service.” Er. Ex. 48 at 1–2. It is the responsibility of the faculty teaching in the Core to achieve these learning goals. Tr. 336. Adjunct faculty play a significant role in the Core, teaching an average of 44 percent of the credit hours over the past five years, ranging from a high of 49 percent to a low of 43 percent. *Id.*

Duquesne holds out that its curricula cannot be divided into courses in which the University’s Catholic, Spiritan tradition is relevant and courses in which it is not. *E.g.*, Tr. 396–97. The Catholic Church and Duquesne (1) hold that faith and reason are two paths with the same end, Tr. 48, and (2) emphasize the unity of academic disciplines as part of one, eternal truth, Tr. 394–95. *See, e.g., supra* pp. 5–7. Though faculty are generally free to design the courses they teach, the University encourages and expects them to embrace the University’s Catholic, Spiritan mission in doing so. Thus, President Dougherty has informed the faculty that

“[a]nything related to the Spiritan and Catholic intellectual traditions cuts across all our disciplines and should be a focus for us.” Er. Ex. 16 at 8 (2013 Convocation Address). Indeed, many of the University’s endowed chairs—a “recognition” given to “outstanding faculty members” who serve as role models for all faculty—are named for Spiritan priests or Catholic intellectual giants. Tr. 101–02; *See* Er. Ex. 12 (listing Duquesne’s endowed chairs).

Duquesne has also created academic centers and programs to encourage all faculty to focus on the Catholic, Spiritan mission in their teaching and research. *E.g.*, Tr. 131. For example, in 2012 Duquesne created the Center for the Catholic Intellectual Tradition (“CCIT”) to “support but also to highlight and showcase the ways in which the work already being done [at Duquesne] engages the Catholic intellectual tradition.” Er. Ex. 57; Tr. 390–91. The Catholic intellectual tradition “animates Duquesne University,” Er. Ex. 58 at 1, and is “founded on an affirmation that truth is one . . . that there is a universality of truth . . . the complementarity of faith and reason.” Tr. 394; *see also* Er. Ex. 58 at 1–2. The Catholic intellectual tradition encompasses all branches of human knowledge and all areas of professional practice, each contributing through a particular skill set to a holistic unity. Tr. 394–95. A “Catholic understanding of education is essentially integrative, and holistic, so it is not something that can be compartmentalized.” Tr. 394. Thus, natural sciences faculty are expected to achieve the mission-related learning goals quoted above in the Core. *See* Tr. 336; Tr. 397, 430–31 (explaining on cross examination that even a class on planets taught by an atheist professor at Duquesne contributes to the Catholic, Spiritan mission). And it would be a mistake to think “that only courses which are taught by theology faculty or offered by the Theology Department would qualify as mission related courses in the core.” Tr. 397; *see also* Tr. 420–421 (an anatomy class can contribute to the Catholic, Spiritan mission).

Through CCIT, all faculty, including adjunct faculty, are invited and “strong[ly] encourage[ed]” to engage with the Catholic intellectual tradition. Tr. 441, 445; *see* Tr. 401–14; Er. Exs. 59–63 (evidencing examples of CCIT programming to which all faculty are generally invited). Many adjunct faculty members do. For example, adjunct faculty have joined an “ongoing, open-ended interdisciplinary conversation exploring the intersection of teaching and the Spiritan charism” to articulate a “Spiritan pedagogy.” Er. Ex. 59; *see* Tr. at 402. Adjunct faculty also have participated in the CCIT’s Catholic Artistic Imagination series, including a discussion of Rublev’s Icon of the Trinity. Tr. 405–40; Er. Ex. 60. And they have engaged in the “Rice on the Road” lecture series held off-campus and related to social justice. Tr. at 408–09; Er. Ex. 61. A “Rice on the Road” program always starts by talking about what is “Spiritan about the process of going out into community” because the “Spiritans are a missionary organization.” Tr. 409–410. The event is always framed explicitly “in reference to the Catholic and Spiritan identity and mission.” Tr. 410.

Adjunct faculty also have applied for and received the CCIT’s “Part-time Faculty Mission Micro-Grant[s].” Tr. 410–12; Er. Exs. 62–63. The website announcement states that “Part-time Faculty contribute to the mission of Duquesne University” and that the grants are intended to support “scholarly, curricular and professional development opportunities that reflect Duquesne’s mission and engage resources in Catholic intellectual tradition.” Er. Ex. 62 at 2. Winners have come from multiple disciplines in the McAnulty College. *See* Er. Ex. 63.

C. Duquesne Hires Faculty for Its Catholic, Spiritan Mission.

Given the integral relationship between Duquesne’s Catholic, Spiritan mission and its academic offerings, Duquesne hires all faculty for mission and publicizes that it does so. Section 1.1 of Duquesne’s first strategic plan read: “Commitment to the mission will be a factor in hiring

and performance evaluations. A candidate's understanding of and willingness to contribute to the mission will be a part of the hiring process. Annual performance evaluations will include a discussion of mission." Er. Ex. 18 at 2. This goal was first because, as President Dougherty testified, "unless we have personnel, administrators and faculty committed to mission, the rest of it is impossible." Tr. 142. The plan is still published on the University's website, and President Dougherty testified that the University is still implementing Section 1.1 today and looking for ways to improve it. Tr. 144, 146, 151.

Provost Timothy Austin, Duquesne's chief academic officer, Tr. 249, testified that mission-hiring is critical for all faculty because the "Spiritan Catholic education that we deliver, is entrusted to our faculty. The task of representing our values, and our priorities, is something that our faculty convey to our students, and we must be satisfied in employing a faculty member that she or he is able to fulfill that responsibility." See Tr. 252. The University implements hiring for mission differently for full-time faculty than it does for adjunct faculty. See Tr. 251. However, the bottom line is the same: the University does not intend to hire faculty who cannot support the University's Catholic, Spiritan mission or express hostility to it. Tr. 263–64 (Provost Austin testimony that "[t]he University is not able to hire anybody who is unable to support the mission of the institution."); accord Tr. 113 (President Dougherty testified: "if we identified a candidate who was extremely indifferent or hostile to the mission, that would be a reason not to hire them.").

An Associate Provost interviews finalists for full-time faculty positions and prepares a report for consideration by the hiring committee, the Provost, and the President. Tr. 253–54. The Provost considers the report in making the hiring decision. See *id.* By contrast, the hiring process for adjunct faculty is more decentralized, with discretion left to department chairs due to

timing and volume. Tr. 254. As described below, the Provost’s job is to “make sure that those who will be involved in that process are appropriately prepared.” Tr. 251; *accord* Tr. 312 (Provost Austin “set[s] the stage”).

For adjunct faculty, to the extent a job posting is used,⁶ it is Duquesne’s policy and practice to include a description of Duquesne’s Catholic, Spiritan identity. *See* Tr. 256; *accord* Union Ex. 23 (job posting, which identified Duquesne as a Catholic, Spiritan University). The University’s “Faculty and Staff Employment Application”—which is the human resources “application form” for all adjunct faculty—quotes the University’s mission statement and in bold text asks the applicant to “Please describe how you would support and contribute to the University Mission.” Er. Ex. 36; *see* Tr. 257–58, 297.

Further, Provost Austin testified that the University expects that adjunct faculty candidates “will be asked to remark on how they see themselves relating to the mission of the university, and that a decision about employment will be made in that context.” Tr. 258–59. The Provost communicates this expectation to chairs at hiring workshops and at new department chair orientations. Tr. 259, 263–64 (hiring workshops); *id.* 261, 263–64 (new chair orientations). Duquesne also publishes and distributes guidelines for departments on how to interview for mission. *See* Tr. 260–61; Er. Ex. 37. The guidelines state that “in order to advance in the search process, candidates must fully understand and be willing to support the University Mission Statement.” Er. Ex. 37. The guidelines also include sample questions such as: “[a]t Duquesne, we take the mission seriously. Rather than being just a ‘statement’ on paper, we strive to ‘live’ it proactively. How do you see yourself as embodying the mission;” and “While teaching performance and qualifications are central to our educational mission, we are also part of a

⁶ Provost Austin testified that department chairs receive unsolicited curriculum vitae through the mail and solicit local Ph.D. departments when seeking to hire adjunct faculty. Tr. 256.

religious tradition here at Duquesne. What are your thoughts about the relationship between faith and reason in the academic environment?” *Id.* Duquesne instructs department chairs that the University cannot hire anyone who is unable to support its Catholic, Spiritan mission. Tr. 264.

D. Duquesne Orients New Adjunct Faculty to Its Catholic, Spiritan Mission.

Duquesne communicates its Catholic, Spiritan mission to new adjunct faculty hires. For example, the University publishes a website titled “Getting Started: Adjunct Faculty at Duquesne.” Tr. 264–65; Er. Ex. 38 (“Getting Started: Adjunct Faculty at Duquesne”). The “Getting Started” website links to a welcome from Provost Austin. Tr. 266–67. Provost Austin’s message explains the University’s mission and communicates Duquesne’s expectation that “each individual to bring his or her gifts as a teacher, as a scholar to the task of furthering that university mission.” Tr. 267. Under bold text titled “First Things,” the “Getting Started Website” proclaims that the University’s mission “provides a context and guide for all that we do at Duquesne” and links to the University’s mission and identity webpage. Tr. 267, 269 (describing Employer Exhibit 1 as the mission and identity webpage); Er. Ex. 38.

The mission and identity webpage, in turn, embeds a YouTube video that addresses the University’s Catholic, Spiritan mission. *See* Er. Ex. 40 (video). The video says: “you can tell that people genuinely care, they put their heart and soul into a lot of different initiatives, it’s very apparent it’s mission driven . . . the mission is definitely what . . . is focused on here at Duquesne.” *Id.* The video concludes by declaring that “Serving God by serving students permeates all aspects of campus life . . . our hope is that Duquesne graduates will in turn serve God by serving others because they have witnessed the many ways the Duquesne community lives that mission” and that “You are Invited to Live the Mission.” *Id.* The welcome website also links to certain important documents such as the *Faculty Handbook*. *See* Er. Ex. 38.

In addition to the website, Duquesne offers new adjunct faculty orientation sessions and encourages participation. Tr. 269–72; Er. Ex. 41 (letter from Provost Austin encouraging attendance). The orientations include a presentation devoted to the University’s mission, typically given by the Vice President for Mission and Identity or that individual’s designee. Tr. 270.

Father McCloskey served as Vice President for Mission and Identity from 2009 to 2013. Tr. 356. A typical new adjunct faculty orientation addresses the mission front-and-center, immediately after the initial welcome. *See* Tr. 369; Ex. 52 (example of “typical” agenda (Spring 2013)). Father McCloskey’s presentation focused on the Catholic identity of the University, its Spiritan mission and history, and the role of adjunct faculty in Duquesne’s Catholic and Spiritan identity. Tr. 375. Father McCloskey typically distributed three documents: (1) a wallet-sized pocket card containing the University’s mission statement and faculty and staff expectations, Er. Ex. 53; (2) a document titled “The Spirit Who Gives Life, Duquesne University,” Er. Ex. 54; and (3) an article titled “Distinctively Catholic,” Er. Ex. 55. *See* Tr. 370–75.⁷

The wallet-sized, pocket card contains the University’s mission statement on one side and “Faculty and Staff Expectations” on the other. The “Faculty and Staff Expectations” include: “1. Accept and commit to the values expressed in the mission statement. 2. Work towards understanding the Spiritan values expressed in the mission statement and strive to incorporate them into your daily work. . . . 7. Recognize and be committed to the importance of service to others. 8. Be respectful of the Catholic tradition on which our university is founded.” Er. Ex. 53.

⁷ The Director of CCIT, Dr. Darlene Weaver, testified that she has provided the mission portion of the adjunct faculty orientation more recently. Much like Father McCloskey, she informs faculty that the University’s Catholic, Spiritan mission belongs to them because of the “ultimate unity of faith and reason, the complementarity, the implementation of different branches of knowledge.” Tr. 417.

“The Spirit Who Gives Life” document states that at Duquesne: “[o]utstanding teacher-scholars and scientists are hired, rewarded and retained to support the mutual enrichment of faith and reason.” Tr. 372; Er. Ex. 54. Father McCloskey held out the “Distinctively Catholic” article as a good article on the role of faculty. See Tr. 373–74. The article emphasizes that morality at a Catholic university is not a “bland humanism,” but a “deeper and more profound tradition of Catholic moral teaching for which the university and faculty is responsive.” Tr. 374. It also describes the Catholic conception of faith and reason and the Catholic intellectual tradition. See, e.g., Er. Ex. 55 at 4 (“Seeking the truth of things, whether in science or the humanities is a religious act.”); *id.* at 2 (“A Catholic intellectual community does not lead students to decide who they *want* to be; it helps them discover who they have been *called* to be. The key concern is not personal identity but dedication to God and to others.”) (emphasis in original). Finally, the article states that “[f]aculty who are skeptical about the intellectual relevance of a Catholic university’s religious mission pose [a] problem.” *Id.* at 3.

E. Duquesne’s Catholic, Spiritan Mission Affects the Terms and Conditions of Faculty Employment.

Duquesne’s Catholic, Spiritan mission affects the terms and conditions of faculty employment. Provost Austin testified that the terms and conditions of adjunct faculty employment are set forth in numerous documents including: the letter of appointment, the *Faculty Handbook*, the Executive Resolutions of the Board of Trustees, and the Administrative Policies (“TAPs”). Tr. 272, 295.

Duquesne’s *Faculty Handbook* applies to “all faculty of the university; it is the standard resource that faculty members of all kinds should go to.” Tr. 273; see Union Ex. 9. The *Faculty Handbook* states in bold text that the “Executive Resolutions and relevant sections of the Faculty Handbook are part of the faculty member’s contractual agreement with the University.” Union

Ex. 9 at 2. For adjuncts the relevant sections are those sections that do not “explicitly refer to such matters as tenure, or . . . to full-time employment.” Tr. 274.

Per the *Faculty Handbook*, Duquesne is a Catholic, Spiritan university with a commitment to ecumenism. “[W]e take great pride in our Catholic character and ambience, and we subscribe to the teachings of the Roman Catholic Church.” Union Ex. 9 at 2; *see* Tr. 273–74. “We” includes the faculty as a whole. Tr. 274. “Our teaching of the moral and ethical foundations of thought and action reflect our Catholic heritage and should pervade the university.” Union Ex. 9 at 2.

The *Faculty Handbook* also provides that individual members of the faculty “shall be deemed to agree to pursue and uphold the purpose of the University as stated in the Second Article of the Charter and to comply with the University’s Bylaws and Executive Resolutions.” Union Ex. 9 at 13; Tr. 275–76. The *Faculty Handbook* defines the “essential role of the faculty” as “implicit in the stated goals and mission of the University.” Union Ex. 9 at 10; Tr. 275–76. “Without the faculty, the University would be unable to prepare its students intellectually, professionally, aesthetically, spiritually, or ethically for the ordinary responsibilities of life and for leadership in a free, complex, and changing society.” Union Ex. 9 at 10; Tr. 275–76. And the *Faculty Handbook* contains Duquesne’s mission statement and goals, including that “[i]t is Duquesne University’s special trust to seek truth and to disseminate knowledge within a moral and spiritual framework.” Union Ex. 9 at 3; *accord* Er. Ex. 5, Introduction § 4 (*Ex Corde*).

Duquesne’s Catholic, Spiritan identity also affects its definition of academic freedom. Tr. 276, 279–81. In relevant part, the *Faculty Handbook* defines academic freedom in teaching as follows: “Academic freedom is essential to teaching. The teacher is entitled to freedom in the classroom. The teacher should not, however, interject opinions which have no relation to the

subject and should not impose personal views of the subject upon the students. *The teacher should respect the religious and ecumenical orientation of the University.*” Union Ex. 9 at 12 (emphasis added); *accord* Er. Ex. 6, Part 2, art. IV, § 4(b). The Executive Resolutions, which control in the event of a conflict with the *Faculty Handbook*, Union Ex. 9 at 3, elaborate that academic freedom in the classroom is “subject to the principles and values expressed in the Duquesne University Mission Statement.” Union Ex. 6, Executive Resolutions of the Board § V.A (defining academic freedom in teaching).⁸ The Provost explained that “academic freedom is an important and foundational value, as in all academic institutions, but that . . . must be constrained by the faculty member’s ability to conform his or her behavior to the mission orientation of the university.” Tr. 281; *see also* Tr. 56 (testimony from President Dougherty that “[v]irtually all of our documents will say academic freedom within the constraints of Catholic doctrine”).⁹

Duquesne’s most recent MSCHE accreditation Self Study is posted to the University’s website and similarly describes Duquesne’s approach to academic freedom:

The Mission Statement defines Duquesne as “a community dedicated to the discovery, enhancement, and communication of knowledge and to the free and diligent pursuit of truth . . .” (appendix MS, p. 2). Duquesne is open to the exploration and discussion of new and controversial ideas. The University places a premium on intellectual autonomy and integrity, and the pursuit of truth through scholarly research. By fostering an atmosphere of openness, the University provides the ecumenical community “for the dialogue of students and teachers of all beliefs.” The search for truth within an atmosphere of openness is a central theme that informs Duquesne as both a University and a Catholic University.

It does not follow, however, that Duquesne’s openness to dialogue will lead it to relinquish those core beliefs that constitute its

⁸ The Executive Resolutions are available on the University’s website. *See* Tr. 176.

⁹ Similarly “[r]esearch proposals [for funding] must be consistent with the goals and objectives of the university.” Tr. 295; Er. Ex. 42 (TAP 44).

specifically Catholic identity. *Hence, ecumenism does not mean that everything is acceptable.* In fact, while academic freedom is essential to teaching at Duquesne, the Faculty Handbook also states that “the teacher should not . . . interject opinions which have no relation to the subject and should not impose personal views of the subject upon the students. The teacher should respect the religious and ecumenical orientation of the University” (appendix FHB, p. 12).

The central conclusion with respect to academic freedom is that *academic autonomy is preserved within the context of Duquesne’s mission statement.* One can have a commitment to Duquesne’s mission and identity and to the values upon which the University was founded without sacrificing academic excellence. Duquesne’s commitment to the scholarly norms of excellence expected within any University is also operationalized through its “goal of hiring, rewarding, and retaining outstanding teacher-scholars” (appendix SSD, p. 19). *Newly appointed faculty are encouraged to conceptualize academic freedom against the backdrop of a vibrant Catholic intellectual tradition and a critical dialogical exchange of ideas.*

Union Ex. 10 at 82–83 (emphasis added); Tr. 341–42 (the quoted discussion is still accurate and on the University website); *accord* Er. Ex. 49 at 11 (the most recent MSCHE evaluation report noting that academic freedom operates “within the context of mission”).

Duquesne’s Catholic, Spiritan identity also informs the grounds on which the University may terminate faculty or decline to rehire adjunct faculty for a subsequent semester. The University employs adjunct faculty for one semester at a time and may refuse to rehire them for any reason. *See, e.g.,* Tr. 108. At Duquesne, the *Faculty Handbook* makes clear that the University may revoke tenure and terminate even full-time faculty for “Serious Misconduct,” defined to include “failure to observe the principles of the Mission Statement of Duquesne University or elaborations thereof approved by the Board of Directors [and] conduct involving moral turpitude” Union Ex. 9 at 19 n.2. Provost Austin testified that if an adjunct faculty member failed to “respect the religious and ecumenical orientation of the university,” the

University would reserve the right to take adverse employment action. *See* Tr. 293–95; *see also* Tr. 117 (testimony of President Dougherty that “we expect [faculty] to respect [Catholic] belief[s] as part of what the community believes, even if they don’t believe them themselves”); *id.* Tr. 125 (testimony of President Dougherty that if an adjunct faculty member mocked the notion of serving God by serving students “seriously, to try to undermine what we stand for . . . [, such conduct] would be grounds for not renewing an adjunct, for example”).

Duquesne’s Catholic, Spiritan mission also affects available employee benefits. For example, Duquesne “has never provided [healthcare] coverage for abortion, contraception or sterilization” and “won’t.” Tr. 112–13.

* * * *

Duquesne’s most recent MSCHE Self Study titled “Education for the Mind, Heart, and Spirit” and corresponding MSCHE evaluation report—both published on the University’s website—summarize the many ways in which Duquesne expresses its Catholic, Spiritan mission. *See* Tr. 338–43; Union Ex. 10 (“Education for the Mind, Heart, and Spirit Duquesne University Self Study”); Er. Ex. 49 (2008 MSCHE evaluation report). For example, the Self Study stated and Duquesne’s accreditation liaison officer confirmed as still accurate that:

- “Duquesne’s students, faculty, staff, and administrators have many opportunities in which to learn about and engage the mission.” Union Ex. 10 at 11; Tr. 338–39;
- “An understanding of the mission and a willingness to contribute to it are emphasized as part of the hiring process.” Union Ex. 10 at 11; Tr. 338–39;
- Duquesne takes steps to provide “Mission Orientation and Programming for All Constituencies.” Union Ex. 10 at 12–13; Tr. Tr. 338–40; and

- “Duquesne’s faculty play a critical role in achieving the University’s mission and the strategic plan goal to develop Duquesne’s reputation for national excellence. They communicate the mission and values of the University to students, serve as role models with regard to ethical standards and openness to diversity, and demonstrate commitment to excellence in liberal professional education in teaching, scholarship, and service.” Union Ex. 10 at 70; *see also* Tr. 341.

The MSCHE evaluation report affirmed the centrality of Duquesne’s Catholic, Spiritan mission and the role of faculty in achieving it: “The Board of Directors, the president, and his entire leadership team have embraced and promoted the mission; and faculty, staff, and students have enthusiastically and sincerely taken it to heart. It is also clear that mission drives many of Duquesne’s goals and objectives, as can be seen in the 2003-2008 strategic plan that places mission front and center. It is clear that the University community has sought, with considerable success, to imbue all its activities with a sense of mission. . . . A sense of mission pervades recruitment, hiring, and performance evaluations of faculty and staff.” Er. Ex. 49 at 4. Accordingly, the MSCHE evaluation report “commend[ed] Duquesne for its embrace of the Spiritan mission and for its many successes at implementing that mission.” *Id.* at 5.

ARGUMENT

The record in this case demonstrates that *PLU* entails the same improper, unconstitutional inquiry as its “substantial religious character” predecessor and fails to avoid the entanglement the *Catholic Bishop* decision exists to avoid. The Board should grant review and abandon *PLU* and adopt the constitutional *Great Falls* test, which Duquesne also satisfies. Nevertheless, as we show below, the Board lacks jurisdiction over Duquesne even under *PLU*.¹⁰

¹⁰ Although the Board need not reach this issue, the *PLU* test, depending on its application, could also substantially burden Duquesne’s free exercise rights in violation of the Religious Freedom Restoration Act, 42

I. THE REGION’S APPLICATION OF *PLU* TO DUQUESNE DEPARTED FROM BOARD PRECEDENT AND WAS BASED ON CLEARLY ERRONEOUS FACT-FINDING.

Under *PLU*, the NLRB has no jurisdiction over a religious-affiliated higher education institution that (1) holds itself out as providing a religious educational environment (“Prong One”), and (2) holds out the petitioned-for faculty members as performing a specific role in creating or maintaining its religious educational environment (“Prong Two”). The Steelworkers conceded and the Region properly held that Duquesne satisfies Prong One. However, the Region misunderstood and misapplied Prong Two and ignored crucial facts and evidence. The NLRB has no jurisdiction under *PLU*.

A. The Region Misunderstood Prong Two.

The Region misunderstood Prong Two. Prong Two asks whether the university holds out petitioned-for faculty as performing a specific role in creating or maintaining its religious educational environment. *PLU*, 361 NLRB No. 157 at *10. *PLU* imagines examples of such a function, including integrating religious teachings into coursework, serving as religious advisors, engaging in religious indoctrination, or conforming to its religious doctrine. *Id.* at *11–12. But *PLU* cautions that these examples are not required and “intended only to demonstrate that there must be a *connection* between the performance of a religious role and faculty members’ employment requirements.” *Id.* at *12, n.14 (emphasis in original). Prong Two bottoms on whether the “religious nature of the university *affects* faculty members’ job duties or requirements”—whether the “religious nature of the university will have any impact at all on their employment.” *Id.* at *11 (emphasis added).

U.S.C. § 2000bb-1 (2000). The *PLU* test allows for a jurisdictional analysis based in part on how individual faculty members further religious mission in practice. This analysis risks forcing Duquesne’s faculty members to choose between furthering Duquesne’s religious mission on the one hand and joining a Board-approved bargaining unit on the other. This dilemma would impede Duquesne’s pursuit of its religious educational mission by discouraging faculty who may want to be represented by a Board-approved bargaining unit from taking an active role in creating and maintaining Duquesne’s religious educational mission.

Among other things, the Board will consider whether faculty members “are hired, fired, and assessed under criteria that . . . *implicate* religious considerations.” *Id.* at *11 (emphasis added). The Board will also consider whether faculty roles are different from those that “they would be expected to fill at virtually all universities.” *Id.* at *12. Relevant evidence includes, but is not limited to “communications to current or potential students and faculty members and the community at large,” *id.* at *11, as well as job descriptions, employment contracts, and faculty handbooks, *id.* at *12. The Board will “rely on the institution’s own statements about whether its teachers are obligated to perform a religious function, without questioning the institution’s good faith or otherwise second-guessing those statements”, and “focus[] on whether a reasonable prospective applicant would conclude that performance of [his or her] faculty responsibilities would require furtherance of the college or university’s religious mission.” *Id.* at *12–13. The Board underscored that its “holding out” inquiry is “limited:” the Board will not examine faculty members’ actual performance of their duties. *Id.* at *11, *13.

In sharp contrast, the Region viewed the Prong Two inquiry as “demanding.” June 5 Order at 9. Where *PLU* focuses on an institution’s “expectations” for faculty communicated to the general public,¹¹ the Region thought spoon-fed requirements necessary. *See, e.g., id.* at 10–11 (acknowledging but disregarding evidence that “‘faculty’ in the broad sense may be charged with certain [religious] responsibilities” and deeming significant whether adjuncts are “personally informed” of such responsibilities). Where *PLU* focuses on an institution’s own

¹¹ *E.g., PLU* at *10 (reasoning that “where faculty members are not *expected* to play such a role in effectuating the university’s religious mission and are not under religious control or discipline, the same sensitive First Amendment concerns of excessive entanglement...are not implicated”) (emphasis added); *id.* at *11 (“Faculty members who are not *expected* to perform a specific role”) (emphasis added); *id.* at *13 n.16 (“We are again not convinced that requiring faculty members to support widely shared university values, such as a commitment to diversity and academic freedom, provides prospective applicants with any indication that they would be *expected* to perform any specific religious function that would differ from their functions at virtually any university”) (emphasis added); *id.* at *18 n.25 (“As discussed above, this type of representation does not communicate the message that employees are *expected* to perform a specific religious function and is not specifically linked to any job duties to be performed by the faculty.”) (emphasis added).

statements about the faculty role, the Region concluded the University failed Prong Two for lack of “specific substantial evidence” regarding the hiring, evaluation, and performance of particular adjunct faculty members. *E.g., id.* at 5–7, 11. Where *PLU* concluded that requiring faculty members to support a university’s mission is insufficient when that mission is not uniquely religious, *PLU* at 13, n.25, the Region viewed as insufficiently religious Duquesne’s mission to “serve God by serving students” including by “service to the Church”. *E.g., id.* at 11.

Duquesne more than satisfies Prong Two for two overarching reasons. First, Duquesne’s mission is religious, and Duquesne consistently communicates to all existing and prospective faculty that their participation in the mission is integral. Second, Duquesne’s religious mission affects adjunct faculty hiring, teaching, its definition of academic freedom, and grounds for non-renewal. Duquesne’s religious mission also conflicts with the requirements of collective bargaining under the NLRA.

1. Duquesne’s Mission is Religious, and Duquesne Holds Out Adjunct Faculty as Performing an Integral Role in Achieving It.

Duquesne’s Catholic, Spiritan mission is a religious mission. It is to “serve[] God by serving students” as a Catholic, Spiritan university “sustained through a partnership of laity and religious” by, among other things, “excellence in liberal and professional education,” “profound concern for moral and spiritual values,” ecumenism, and “[s]ervice to the Church, the community, the nation, and the world.” *E.g., Er. Ex. 1; accord Er. Ex. 11; Union Ex. 9.* Duquesne holds out all aspects of the mission as contributing to the mission of both the Church and the Spiritans. *See, e.g., Er. Ex. 1; Er. Ex. 5; Er. Ex. 6; Er. Ex. 50; Tr. 68; supra pp. 4–9.*

The Region’s conclusion that “[i]n its website and publications, the Employer makes no claim that the adjunct instructors who are members of the petitioned-for unit play any role in contributing to the University’s mission or religious environment,” June 5 Order at 10, is clearly

erroneous. Duquesne's physical campus, its website, statements to faculty at academic convocations, and many other communications hold out that all faculty play an indispensable role in this mission. *E.g.*, Er. Ex. 15 at 3–4; *see supra* pp. 13–30. For example, students walk past ubiquitous Catholic symbols to arrive in classrooms in which professors of all disciplines, from adjunct to tenured, teach under a crucifix. *See, e.g.*, Tr. at 220–22; Er. Ex. 9; Er. Ex. 25.

More, Duquesne's webpage titled "Getting Started: Adjunct Faculty at Duquesne" states under a bold header titled "First Things" that the University's religious mission "provides a context and guide for all that we do at Duquesne." Tr. 267, 269; Er. Ex. 38. Duquesne publicly proclaims on its website to all faculty that "who we are at our core is best illustrated when one faculty member assists one student to grow in knowledge and maturity within a Catholic, Spiritan context." Er. Ex. 16 at 1. Duquesne also communicates publicly on its website to all faculty that "you are a critical part of the trinity at the heart of who we are as you bring our students an education for a lifetime in our Catholic, Spiritan tradition. You serve God by serving our students." *Id.* at 17. Contrary to the June 5 Order, such representations plainly hold out the faculty as playing a "role in contributing to the University's religious mission or environment," and certainly that the University expects adjunct faculty members to play that role. Duquesne has many categories of faculty, and nothing in the record suggests that a reference to the "faculty" as a whole would exclude adjuncts. Indeed, the record contains evidence, totally ignored by the Regional Director, that "faculty" includes adjuncts. *E.g.*, Tr. 315-16, 329; Er. Ex. 11 at 5. As service to God is a quintessential "specific religious function," the inquiry should end here.¹²

2. *Duquesne Holds Out that Its Catholic, Spiritan Mission Affects Adjunct Faculty Hiring, Job Duties, the Definition of Academic Freedom, and*

¹² *PLU* states unequivocally that the Board considers "communications to current or potential students and faculty members, and the community at large." *Id.* at *11.

***Grounds for Non-Renewal, and the Region's Contrary Conclusion
Misapplied PLU's Limited Holding Out Requirement.***

Duquesne's Catholic, Spiritan mission affects adjunct faculty employment in concrete ways: who is hired, the curricula taught, the University's definition of academic freedom, and grounds for non-renewal. The Region reached a contrary conclusion by misapplying *PLU's* limited holding-out requirement.

(a) Who is hired.

As an initial matter, Duquesne holds out that its Catholic, Spiritan mission affects adjunct faculty hiring. The Region ruled that "there is no evidence" that the University's religious mission is "a consideration in hiring." June 5 Order at 11. To reach that conclusion, the Region had to ignore the University's strategic plans, its human resources website and recruitment brochures, its adjunct faculty application for employment, and its instruction, guidelines, and expectations for how department chairs are to interview adjunct faculty candidates. The record is clear that Duquesne holds out that it hires for mission, and the Region's contrary decision is based on clearly erroneous fact-finding and failure to apply *PLU's* limited holding out analysis.

The first goal of Duquesne's first strategic plan reads: "1.1 Commitment to the mission will be a factor in hiring . . . A candidate's understanding of and willingness to contribute to the mission will be a part of the hiring process." Er. Ex. 18 at 2. The plan is currently published on the University's website. Tr. 144, 146, 151. The Region ignored this clear evidence of how the University holds itself out because the Region deemed it "clearly...goals, as opposed to established facts." June 5 Order at 5, n.12. But a reasonable prospective faculty member would research the University, review the strategic plans, and understand that a top University priority is hiring for its religious mission. The Region's apparent preference for specific evidence of 100% success in implementation has no basis in *PLU*. In any event, the record is clear that the

University has implemented Section 1.1.'s call for mission hiring, continues to do so, and looks for ways to improve such hiring. *E.g.*, Tr. 144 (President Dougherty testimony that Goal 1.1. was implemented and "is still being done today"); *id.* at 146–47 (President Dougherty testimony that the University looks for ways to improve mission hiring); *id.* at 151.

The Region's claim that the University produced "no evidence" that its religious mission factors in adjunct faculty hiring is contrary to other evidence in the record. For example, the University's website contains its accreditor's independent evaluation report, which states "[a] sense of mission pervades recruitment, hiring" Er. Ex. 49 at 4. Duquesne's Human Resources website states that "[a]pplicants must be willing to contribute actively to the mission and to respect the Spiritan Catholic identity of Duquesne University," Er. Ex. 34, and its recruitment brochure states that "[o]ur employees contribute to our vision of enhancing our culture of academic excellence dedicated to our mission of serving God by serving students," Er. Ex. 33.

Moreover, Duquesne's "Faculty and Staff" application form for adjunct faculty in the McAnulty College specifically asks applicants to "describe how you would support and contribute to the University Mission." Er. Ex. 36; *see* Tr. 258. The Region ignored the application because it is "not always utilized." June 5 Order at 5. But again, under *PLU's* limited holding out inquiry whether the application is "always utilized" is irrelevant and improper trolling into how well the University implements its religious mission. Even if relevant, there is no contemporary evidence in the record for the Region's claim.

Finally, Duquesne trains academic department chairs in the University's expectation that they will take the University's Catholic, Spiritan mission into account in the adjunct faculty interviewing and hiring process, and the University distributes guidance about how to do so.

See, e.g., Tr. 259–60. The guidelines include sample questions such as “[w]hile teaching performance and qualifications are central to our educational mission, we are also part of a religious tradition here at Duquesne. What are your thoughts about the relationship between faith and reason in the academic environment?” Er. Ex. 37. Duquesne instructs department chairs that the University cannot hire anyone who is unable to support its Catholic, Spiritan mission. Tr. 264. The guidelines state unequivocally that “in order to advance in the search process, candidates must fully understand and be willing to support the University Mission Statement.” Er. Ex. 37. The Region ignored this evidence because “there is no evidence in the record from any department chair as to how the hiring is actually accomplished and what information is communicated to the adjunct applicant.” June 5 Order at 5. Again, that sort of inquiry is improper and irrelevant trolling into how well the University implements its religious mission. It is the University’s “expectations” that count under *PLU*.

As Provost Austin testified, “[t]he University is not able to hire anybody who is unable to support the mission of the institution.” Tr. 263–64; *accord* Tr. 113 (President Dougherty testified: “if we identified a candidate who was extremely indifferent or hostile to the mission, that would be a reason not to hire them.”). The reason is that the “Spiritan Catholic education that we deliver, is entrusted to our faculty. The task of representing our values, and our priorities, is something that our faculty convey to our students, and we must be satisfied in employing a faculty member that she or he is able to fulfill that responsibility.” Tr. 252. In short, Duquesne publicly reserves the right to hire a candidate best suited for its Catholic, Spiritan mission, not the candidate with other qualities that the Steelworkers or secular institutions might prefer (such

as years of service).¹³ The Region's contrary conclusion on this point stems from improper, intrusive extension of *PLU* and clearly erroneous fact-finding.

(b) How and what is taught.

The University's religious mission affects how and what is taught by adjunct faculty members. In reaching a contrary decision on this point, the Region improperly ignored or discounted the University's *Faculty Handbook*, which is a part of each adjunct faculty member's contract with the University, the University's website, and the University's orientations for adjunct faculty members. The Region also disregarded evidence that certain adjunct faculty members require a Mandatum from the local Bishop and that adjunct faculty teach curricula specifically designed to serve the University's religious mission.

Once hired, Duquesne's adjunct faculty are contractually obligated through the *Faculty Handbook* to support the purposes of the University. Union Ex. 9 at 13; Tr. 275–76. Their role is also defined contractually through the *Faculty Handbook* as implicit in the University's mission and goals, which include a “special trust to seek truth and to disseminate knowledge within a moral and spiritual framework.” See Union Ex. 9 at 10; *id.* at 3; Tr. 276. The Provost confirmed that this language applies to adjunct faculty, Tr. 274, and adjunct faculty therefore have a contractual obligation to execute their responsibilities within such “moral and spiritual framework.” The *Faculty Handbook* states unequivocally that “we take great pride in our Catholic character and ambience, and we subscribe to the teachings of the Roman Catholic Church,” and that “[o]ur teaching of the moral and ethical foundations of thought and action

¹³ Two Steelworkers witnesses testified that they were not asked about Duquesne's mission when hired in 2007 and 2008, respectively, long before the hearing in this case. See Tr. 457, 460, 487-88. Even assuming these statements were true, they prove nothing other than that Duquesne's approach to achieving its clear and public goal of hiring for mission had not achieved 100-percent effectiveness as of more than half a decade ago. Duquesne unquestionably holds out that its Catholic, Spiritan mission affects adjunct faculty hiring. While the Board considered adjunct faculty testimony in *PLU* to show religion did not factor in hiring, unlike here, the Board had no public *PLU* documents stating that it did. See 361 NLRB No. 157 at *12 (citing no such documents).

reflect our Catholic heritage and should pervade the university.” Union Ex. 9 at 2. The Region’s finding that “[t]here is no mention of any . . . religious duties in the adjuncts’ employment contracts,” June 5 Order at 10, either rests on an improper assumption about what is “religious” or is clearly erroneous because the *Faculty Handbook* is part of an adjunct faculty member’s contract with the University. Union Ex. 9 at 2.

Duquesne provides new adjunct faculty orientations in part to emphasize the University’s mission expectations. For example, new adjunct faculty received literature explaining that “[o]utstanding teacher-scholars and scientists are hired, rewarded and retained to support the mutual enrichment of faith and reason.” Tr. 372; Er. Ex. 54. New adjuncts also received wallet-sized pocket cards listing a series of “Faculty and Staff Expectations,” such as “[w]ork towards understanding the Spiritan values expressed in the mission statement and strive to incorporate them into your daily work” and “[b]e respectful of the Catholic tradition on which our university is founded.” Er. Ex. 53; *see* Tr. 372. The Region completely ignored evidence about orientation, apparently because such orientation is not mandatory. June 5 Order at 5, 10–11. However, a reasonable new adjunct faculty member would attend orientation and learn that the University expects adjunct faculty to understand the University’s religious mission and incorporate it into their daily work. The Region’s assertion that “[t]here is a lack of evidence that adjuncts are informed of any requirement of participation with respect to conveying or supporting the Employer’s mission” is clearly erroneous and a misapplication of *PLU*. *See* June 5 Order at 11.

Adjunct faculty who teach Catholic theology are required to have a Mandatum from the Bishop, and at least one adjunct faculty member who voted in the election has one. *See* Er. Ex. 8 (adjunct faculty member S. Patrick Doering). The Region inexplicably ignored the Mandatum requirement altogether and failed to carve out even this subset of adjuncts from jurisdiction.

All adjunct faculty, of course, teach courses as part of curricula, and the University holds out curricula as one area where “concerns that are especially Catholic must dominate.” Er. Ex. 13 at 3. Indeed, all curricula are explicitly linked to Duquesne’s Catholic, Spiritan mission through the Dimensions. *See* Tr. 327–33; Er. Ex. 46. By, among other ways, linking to *Ex Corde* on its website and through the work of CCIT, Duquesne holds out that its entire academic endeavor serves its religious mission. *See, e.g., supra* pp. 4–8, 12, 13–20, 23–30; Er. Ex. 65 at 2010-2011 Catalog, 60 (describing the McNulty college as “at the center of Duquesne University’s Education for the Mind, Heart and Spirit,” as embodying “both Duquesne’s Catholic tradition and its ecumenical atmosphere,” and as striving for “respect for the dignity of the human person”). Without any explanation, the Region ignored that the University holds out that the curricula that adjunct faculty help deliver serves its religious mission. June 5 Order at 10–11.

Furthermore, adjunct faculty teach extensively in Duquesne’s Core, teaching an average of 44 percent of core credit hours over the past five years. Tr. 336. University website documents show that the Core “uniquely expresses the Spiritan-Catholic identity of Duquesne University.” Er. Ex. 47 (Core Curriculum Website Page). Faculty in all disciplines who teach in the Core are responsible for achieving student learning outcomes such as “[i]dentify some of the unique perspectives provided by faith and reason in the pursuit of truth.” *See* Union Ex. 14 at 1–2; Tr. 336. Again, the Region inexplicably ignored that adjuncts are responsible for teaching a curriculum and achieving student learning outcomes uniquely designed to further its Catholic, Spiritan mission. June 5 Order at 10–11.

Crucifixes in every classroom serve as a tangible reminder of the unity between the academic endeavor and the religious mission. *E.g.,* Tr. at 221. By word, example, and reward,

Duquesne encourages adjunct faculty to deepen the already present connection between their work and the Catholic intellectual tradition, and many have done so. *See, e.g., supra* pp. 16–20 (discussing the CCIT’s programming and opportunities, including the “Part-time Faculty Micro-Mission Grant”). In short, as President Dougherty testified, the University encourages faculty to make the connection between faith and reason. Tr. 56. Although Duquesne does not “force faculty to do anything related to Catholicism,” we “invite them in, we expect them to participate.” Tr. 131. And it is the University’s expectations that count under *PLU* and that the Region completely failed to consider.

c. The definition of academic freedom and grounds for nonrenewal.

Whatever else adjunct faculty may do, they may not improperly undercut Duquesne’s Catholic, Spiritan mission. This principle is evident first in Duquesne’s definition of academic freedom and, second, in Duquesne’s definition of “Serious Misconduct.” Although the Region recognized that adjunct faculty may not be “openly hostile” to the University’s religious mission, June 5 Order at 10, the Region improperly failed to accept that for this and like reasons the Board must decline jurisdiction under *PLU*.

Duquesne adheres to principles of academic freedom and encourages faculty to pursue the truth wherever it leads in the context of its mission. Duquesne’s terms and conditions of employment define academic freedom in teaching as “subject to the principles and values expressed in the Duquesne University Mission Statement” and require teachers to “respect the religious and ecumenical orientation of the University.” Union Ex. 6, § V.A; Union Ex. 9 at 12.¹⁴ The *Faculty Handbook* also states unequivocally that “we take great pride in our Catholic

¹⁴ In relevant part, the 1940 Statement of Principles on Academic Freedom and Tenure of the American Association of University Professors (“AAUP”) states: “Teachers are entitled to freedom in the classroom in discussing their subject, but should be careful not to introduce into their teaching controversial matter which has no

character and ambience, and we subscribe to the teachings of the Roman Catholic Church.” Union Ex. 9 at 2; *see* Tr. 273–74. In short, though free professional and academic analysis is encouraged, Duquesne reserves the right to determine that an adjunct faculty member’s purported exercise of academic freedom improperly violated or failed to respect Duquesne’s Catholic, Spiritan mission. *See* Union Ex. 10 at 82–83 (Duquesne’s Self Study describing academic freedom and underscoring that “[i]t does not follow, however, that Duquesne’s openness to dialogue will lead it to relinquish those core beliefs that constitute its specifically Catholic identity. Hence, ecumenism does not mean that everything is acceptable”). Research proposals similarly “must be consistent with the goals and objectives of the university.” Tr. 295; Er. Ex. 42 (TAP 44).

Duquesne employs adjunct faculty members on a semester-by-semester basis. *E.g.*, Tr. 464–65. Any reasonable prospective adjunct faculty member would understand that the University would not tolerate behavior from an adjunct that could result in revocation of a full-time faculty member’s tenure. Under the *Faculty Handbook*, Duquesne may revoke tenure for “Serious Misconduct,” defined to include the “failure to observe the principles of the Mission Statement of Duquesne University or elaborations thereof approved by the Board of Directors” and “conduct involving moral turpitude.” Union Ex. 9 at 19, n.2. Indeed, Provost Austin testified without contradiction that failure to respect the religious and ecumenical orientation of the University could result in non-renewal of an adjunct faculty member’s contract. *See* Tr. 295; *see also* Tr. 117 (testimony of President Dougherty that “we expect [faculty] to respect [Catholic] beliefs as part of what the community believes, even if they don’t believe them themselves”); Tr. 125 (testimony of President Dougherty that if an adjunct faculty member

relation to their subject. *Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.*” Union Ex. 11 at 14 ¶ 2 (footnotes omitted, emphasis added). The *Faculty Handbook* is written, applies, and is in force at the time of appointment.

mocked the notion of serving God by serving students “seriously, to try to undermine what we stand for . . . [, such conduct] would be grounds for not renewing an adjunct, for example”).

Duquesne’s approach to academic freedom and serious misconduct are consistent with *Ex Corde* and the USCCB Application. Those documents call for academic freedom and responsibility and respect for Catholic teachings. Er. Ex. 6, Part 2, Art IV, § 4(b) (USCCB Application, which states “[a]ll professors are expected to exhibit not only academic competence and good character but also respect for Catholic doctrine. When these qualities are found to be lacking, the university statutes are to specify the competent authority and the process to be followed to remedy the situation.”); accord Er. Ex. 5, Part I, § 27 (*Ex Corde*, which states “[n]on-Catholic members are required to respect the Catholic character of the University”); *id.* Part II, art. 2, § 4 (“Catholic teaching and discipline are to influence all university activities, while the freedom of conscience of each person is to be fully respected.”); *id.* Part II, art. 4, § 2 (“All teachers and all administrators, at the time of their appointment, are to be informed about the Catholic identity of the Institution and its implications, and about their responsibility to promote, or at least to respect, that identity.”).

In sum, Duquesne draws a line—respect for the religious and ecumenical orientation of the University—and that line is dictated by and implicates Church teaching in *Ex Corde* and the USCCB Application. *PLU* makes clear that this religious boundary is exactly the type of line *Catholic Bishop* forbids the Board from policing. See *PLU*, 361 NLRB No. 157 at *13, n.19 (“We will decline jurisdiction so long as the university’s public representations make it clear that faculty members are subject to employment-related decisions that are based on religious considerations.”).¹⁵ The Region admitted that this line exists at the University, but improperly

¹⁵ The Steelworkers argued that the terms and conditions of faculty employment are no different at Duquesne than at secular universities, but the Board should understand that the AAUP and members of Duquesne’s faculty

disregarded it apparently for lack of “evidence of any complaints concerning adjuncts who were ‘hostile’ or who have been disciplined.” June 5 Order at 5. Straining to assert jurisdiction, the Region thus ignored that *PLU* explicitly forbids “look[ing] behind these documents” or “inspect[ing] the university’s actual practice with respect to faculty members.” *PLU* at *12. The Region misapplied *PLU*’s limited holding out requirement.

* * *

Given the powerful effect of Duquesne’s Catholic, Spiritan mission on adjunct faculty employment, the Steelworkers argued that Duquesne’s mission is not religious.¹⁶ See Post-

have expressed otherwise. The Hearing Officer improperly excluded on relevancy and hearsay grounds three e-mail messages from members of the Duquesne faculty addressing these issues, including one enclosing an AAUP analysis. See Tr. at 320–26. The AAUP, for example, analyzed the definition of “serious misconduct” in the *Faculty Handbook*. Rejected Er. Ex. 43, Attachment (Letter on Behalf of AAUP to Duquesne Professor); see also Tr. 315–17. The AAUP had “serious concerns” including “[w]hat would constitute ‘a failure to observe the principles of the Mission Statement’?” Rejected Er. Ex. 43 at Enclosure. Another professor—whom the Steelworkers’ counsel labeled a “Union guy,” Tr. 322—expressed concern that some faculty candidates were not hired for failing the “‘mission and identity test.’” Rejected Er. Ex. 44; see also Tr. 322–24. Another explained that “Catholic Universities in America are at risk that Catholic authorities will seek to intervene inappropriately into academic discussions . . . [which] requires both vigilance and prudence as faculty members seek to engage all questions and issues but not in a way that misrepresents the identity, mission and value system to which the University subscribes to seek and attain.” Rejected Er. Ex. 45; see also 324–26. The Hearing Officer’s erroneous ruling does not foreclose the Board’s consideration of these exhibits.

¹⁶ The testimony of the Steelworkers’ only witnesses demonstrates how Duquesne’s religious mission affects adjunct faculty employment. Both teach in the Core. Tr. 456–57, 508. Professor Clint Benjamin teaches composition courses, and Professor Adam Davis teaches History of Science. Both witnesses could connect their classes expressly to the Catholic intellectual tradition and Duquesne’s religious mission. Composition is obviously broad enough to do so. One of Professor Davis’s own textbooks is apparently David Lindberg’s *The Beginnings of Western Science*. See Tr. 509–10 (transcript refers to “David Lindbergh” and “The History of Western Science”). The 2007 edition of the Lindberg text contains many references to “Church” and “Catholic” and even refers to “transubstantiation” (i.e., the transformation of bread and wine into the body and blood of Christ during the Catholic Mass). It also states: “One of the charges frequently leveled against the church is that it was broadly anti-intellectual—that the leaders of the church preferred faith to reason and ignorance to education. In fact this is a major distortion.” Lindberg, *supra* at 148. The church’s mission “did not include the suppression of scientific investigations and ideas.” *Id.* at 149.

Professor Benjamin testified that he teaches the same courses at public institutions and makes no effort to modify the content or engage with the University’s mission. See Tr. 457, 478. Professor Davis testified that he believes mission is relevant to faculty only if it is articulated, Tr. 501, and implied that no one articulated it to him, see Tr. 490–95. Both witnesses’ testimony is irrelevant because *PLU* is clear that the Board will not consider faculty members’ actual performance of their duties. *PLU*, 361 NLRB No. 157 at *11. Regardless, today, Duquesne reserves the right not to rehire both professors and replace them with professors willing and/or better able to incorporate Duquesne’s Catholic, Spiritan mission into their courses. If either were to undermine Duquesne’s Catholic, Spiritan mission—for example, because his textbook mentions transubstantiation, if Mr. Davis improperly

Hearing Brief at 28 (characterizing the mission as ecumenical, not religious). Even if it were constitutional for a government agency to decide that question—as explained below, it is not—the plain text of Duquesne’s mission plus *PLU’s* focus on a reasonable prospective faculty member rebut the idea.

However, to suggest that Duquesne’s mission is not religious is a problem for another reason of deep significance under *Catholic Bishop*. Only one group has the power to determine the mission and philosophy of the University: the Spiritan priests and brothers who are Members of the corporation. Er. Ex. 2, arts. VIII, IX; Er. Ex. 3, art. IV. The Region inexplicably ignored this fact. The Spiritan priests and brothers who are Members alone have the authority to define the mission, change it, and thus interpret it. *See id.* A former Spiritan Provincial Superior and current Member of the corporation testified that Duquesne’s “religious mission . . . is vitally important, its mission as Catholic and Spiritan, to me, and to members of the corporation.” Tr. 363; *see also* Tr. 359–62 (explaining that education is an integral part of the Spiritan mission of evangelization and that the entire Duquesne community, including faculty, shares in that charism). Therefore, there is an obvious and tremendous potential for entanglement if the Board asserts jurisdiction here—particularly when the Members’ other exclusive, reserved powers include appointing the Board, amending the Articles of Incorporation, and closing the

denigrated the sacrament of the Eucharist—Duquesne would have the right to take adverse action. *See* Tr. 478, 501 (denying denigration of Catholicism in class).

NLRB supervision of the relationship between Duquesne and its adjunct faculty would entail tremendous potential for entanglement. As just one example, if the Steelworkers claimed that Duquesne refused to rehire an adjunct professor who denigrated Duquesne’s mission, and the Steelworkers argued that the refusal was actually driven by anti-union animus, the University’s good faith would be put squarely at issue. This type of dispute is just what the Supreme Court in *Catholic Bishop* sought to avoid. *See* 440 U.S. at 502 (fearing that an unfair labor practice charge might force the Board to decide the “good faith of the position asserted by the clergy-administrators and its relationship to the school’s religious mission”); *Universidad Cent. de Bayamon v. NLRB*, 793 F.2d 383, 401 (1st Cir. 1985) (en banc) (controlling opinion of Breyer, J.) (“One can imagine the University imposing sanctions upon faculty that relate, let us say, to counseling in the sensitive area of abortion; reviewing such sanctions would place the Board squarely in the position of determining what is ‘good faith’ Dominican practice in respect to such counseling.”).

University. See Er. Ex. 2, arts. VIII, IX; Er. Ex. 3, art. 4. In this and many other respects, Duquesne is like the institution at issue in *St. Joseph's College*, a case in which the Board wisely declined jurisdiction even before *PLU*. 282 NLRB No. 9 at *3, *6 (1986) (declining jurisdiction when a religious order had ultimate authority over the college and the college required faculty to promote the objectives and goals of the order, although not to teach religious dogma).

II. THE SECOND PRONG OF *PLU* CREATES THE ENTANGLEMENT *CATHOLIC BISHOP* EXISTS TO AVOID, AND DUQUESNE EASILY SATISFIES THE CONSTITUTIONAL *GREAT FALLS* TEST.

For all of the reasons set forth above, Duquesne is not subject to NLRB jurisdiction under *PLU*. However, the record in this case demonstrates that the second prong of *PLU* repackages the former improper and entangling “substantial religious character test” without addressing the constitutional avoidance doctrine motivating *Catholic Bishop*. The Board should grant review to discard *PLU* and adopt and apply the constitutional *Great Falls* test, which Duquesne easily satisfies.

A. The Second Prong of *PLU* Creates the Unconstitutional Entanglement *Catholic Bishop* Exists to Avoid.

The Supreme Court decided *Catholic Bishop* on constitutional avoidance grounds: it was enough that the assertion of jurisdiction would raise “serious First Amendment questions.” 440 U.S. at 504; see also *Great Falls*, 278 F.3d at 1340 (“*Catholic Bishop* was decided on grounds of constitutional avoidance”). By contrast, the Board in *PLU* improperly seeks to balance the First Amendment protections and the NLRA and to assert “the broadest jurisdiction constitutionally permissible.” 361 NLRB No. 157 at *8. The record in this case demonstrates the folly of that attempted balancing: *PLU*’s underlying assumptions and analytical framework are inherently entangling, and *PLU* fails to guard against the risk of future entanglement.

The analysis *PLU* demands is itself improperly entangling because the government decides what constitutes a “specific religious function.” The First Amendment forbids the government from deciding what is secular and what is religious. *See Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 336 (1987) (“The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.”) (footnote omitted); *see also Town of Greece v. Galloway*, 134 S. Ct. 1811, 1822 (2014) (observing that analysis of whether legislative prayers were nonsectarian “would involve government in religious matters to a far greater degree”); *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion) (concluding that inquiry into “whether a school is pervasively sectarian is not only unnecessary but also offensive”); *Hernandez v. Comm’r of Internal Revenue*, 490 U.S. 680, 694 (1989) (rejecting proposal that “would force the IRS and the judiciary into differentiating ‘religious’ services from ‘secular’ ones”).

PLU claims to avoid this problem by focusing only on an institution’s own statements about the faculty role. But the Board has defined “specific religious function” based on its own assumptions about what is religious and what is not. The Board admitted in *PLU* that the inquiry is *not* simply whether the university holds out its faculty as performing a religious function, but whether the university holds out its faculty as “performing a . . . role that they would [not] be expected to fill at virtually all universities” as understood by the Board. 361 NLRB No. 157 at *12. The Board went so far as to cast aside the importance of academic freedom to Lutheranism and to presume that a commitment by a religious institution to “diversity and academic freedom” puts forth the message that “religion has no bearing on faculty members’ job duties or

responsibilities.” *Id.* at *11. The dangerous implicit assumption is that diversity and academic freedom are inconsistent with a genuinely religious endeavor—only fundamentalist religions and strident proselytizing count. *But see Great Falls*, 278 F.3d at 1346 (“That a secular university might share some goals and practices with a Catholic or other religious institution cannot render the actions of the latter any less religious.”); *id.* (“Religion may have as much to do with why one takes an action as it does with what action one takes.”). Similarly, the Board took it upon itself to determine that *PLU*’s mission was not a religious mission. 361 NLRB at *18 n.25. The Board thus eviscerated whatever entanglement avoidance a holding-out requirement might achieve, arrogated to itself the job of determining what is and is not sufficiently religious based on its own assumptions, and improperly preferred “some religions (and thereby some approaches to indoctrinating religion) to others.” *Great Falls*, 278 F.3d at 1346.

The record in this case reinforces the point. The Catholic Church teaches—and Duquesne holds out—that Catholic universities grow from the heart of the Church and contribute to its mission of spreading the Good News. However, they do so in part precisely by recognizing academic freedom and responsibility and welcoming diversity. Such values grow directly from *Ex Corde* and the USCCB Application, which teach that faith and reason are valuable and compatible and that all people are children of God, endowed with inherent human dignity and free to choose the faith (or not). *See, e.g., supra* pp. 5–7. These principles are rooted in Catholic doctrine. For example, the *Catechism of the Catholic Church* states that: “methodical research in all branches of knowledge, provided it is carried out in a truly scientific manner and does not override moral laws, can never conflict with the faith, because the things of the world and the things of faith derive from the same God. The humble and persevering investigator of the secrets of nature is being led, as it were, by the hand of God in spite of himself, for it is God, the

conserver of all things, who made them what they are.” § 159.¹⁷ Thus, to rule that Duquesne does not hold out faculty as performing a religious function because it welcomes a diverse faculty and gives them academic freedom and responsibility would be based not on what Duquesne or the Church holds out, but rather on the Board’s improper, entangling assumptions. It would also send an offensive and harmful official message from the United States government that whatever Duquesne and the Catholic Church say, Duquesne’s academic endeavor is unconnected to its religious mission. Such governmental decisions about religious matters are exactly what the *Catholic Bishop* decision exists to prevent.

PLU invites the Board to determine what is and is not religious in another more subtle, but equally harmful way. Specifically, *PLU* focuses on whether a “reasonable” prospective applicant would understand an institution’s public documents to communicate that religion has a bearing on employment. 361 NLRB No. 157 at *13. But the “reasonable” person is a federal agency interpreting a religious institution’s documents on its own and deciding what is religious and what is secular. For example, in this case the Hearing Officer not infrequently forbade inquiry into how Duquesne¹⁸ understood its own documents, not to mention its Catholic, Spiritan mission, its strategy to achieve it, and its understanding of how its mission would affect its ability to negotiate with a union. *E.g.*, Tr. 154–57 (ruling inadmissible that Duquesne would refuse to bargain over healthcare benefits for contraception and abortion and over the role of adjunct faculty in its religious mission); Tr. 294 (ruling inadmissible the University’s chief academic officer’s interpretation of the *Faculty Handbook*); *see also* Tr. 50, 141–42, 283–84.

PLU thus leaves the Board to make its own interpretation and determination.

¹⁷ Apparently seeking to avoid entanglement, the Hearing Officer forbade any questions about the *Catechism*. Tr. 419. However, it is available on the Vatican’s website and presents “the essential and fundamental contents of Catholic doctrine.” *Catechism of the Catholic Church*, Prologue III, § 11, *available at* http://www.vatican.va/archive/ENG0015/_INDEX.HTM.

¹⁸ Speaking through University officials, such as its president, provost, and a member of the corporation.

For similar reasons, the Board's approach in *PLU* also fails to guard against the risk of entanglement in the future. *See Universidad Cent. de Bayamon v. NLRB*, 793 F.2d 383, 401–02 (1985) (Breyer, J.) (explaining “‘mandatory subjects of bargaining’ . . . in the context of ‘educational institutions’ may concern the whole of school life”) (citation omitted). What counts for entanglement purposes is the position the University would adopt when taking particular employment actions or in union negotiations—not the Board's *ex ante* interpretation of cold documents. For example, the June 5 Order ignored that the University's public goal is to consider its religious mission in faculty hiring because a goal is not a requirement. June 5 Order at 5 n.12. But if the Board asserts jurisdiction, Duquesne may be forced to defend a hiring decision in furtherance of that goal or its refusal to bargain over mission-related hiring criteria in an unfair labor practice proceeding before this agency. Again, this injection of the Board into the relationship between a religious-affiliated institution and its faculty is exactly what the *Catholic Bishop* decision exists to avoid.

Finally, *PLU* wrongly assumes that a religious institution's religious mission is frozen. *PLU* concludes that if a University does not at the time of a hearing require faculty to perform what the NLRB deems a specific religious function, then there is no entanglement problem, and the constitutional avoidance concern motivating *Catholic Bishop* is resolved. Far from it. Here, for example, the Spiritans control the University's mission and philosophy and have sole authority to change it or Duquesne's approach. President Dougherty's 2014 convocation address hinted at the potential need for change; at once calling for even greater “stress on our mission,” *Er. Ex.* 17 at 6, while at the same time identifying two factors that “will affect the future on this score in unknown ways”: vocations to the Spiritans have declined, and young Americans are “alienated from organized religion as never before,” *id.* at 8. *See Tr.* 134–36.

In response to these factors, the University could decide to require more of its faculty regarding its Catholic, Spiritan mission, such as requiring participation in CCIT programs on Spiritan pedagogy. If a union existed, and if it sought to bargain over the University's decision regarding faculty professional development or argued that the University's new requirements were an unlawful unilateral change in terms and conditions of employment, the Board's supervision of such issues would create a First Amendment entanglement nightmare. *See Bayamon*, 793 F.2d at 402 (identifying a potential entanglement because certain faculty "objected to teaching so many theology and philosophy courses"). Similarly, there would be an entanglement nightmare if a union sought to bargain over a University decision to institute a formalized evaluation system to assess contributions to Duquesne's religious mission, with retention contingent on satisfactory performance. Thus, even if the Board concludes that Duquesne's current approach to achieving its Catholic, Spiritan mission is not religious enough or implemented well enough for the Board, it has not meaningfully solved the Constitutional avoidance concern motivating *Catholic Bishop*.

B. Duquesne Meets the *Great Falls* Test.

This case demonstrates the folly of *PLU*'s attempt "to avoid entanglement by creating new, finely spun judicial distinctions" because the application of such distinctions results and here resulted in entanglement. *See Bayamon*, 793 F.2d at 402 (Breyer, J.). The Board should abandon *PLU* and apply *Great Falls*.

Under *Great Falls*, the Board cannot assert jurisdiction over a university that (1) holds itself out as providing a religious educational environment, (2) is organized as a nonprofit, and (3) is affiliated with a recognized religious organization. 278 F.3d at 1343–44. Here, it is stipulated that Duquesne is a nonprofit corporation, and it is indisputable that Duquesne is

affiliated with the Catholic Church and the Spiritan congregation. For all the reasons that Duquesne meets *PLU*, it satisfies the *Great Falls* requirement that it hold itself out as providing a religious educational environment.

CONCLUSION

For the foregoing reasons, the Board should grant review and decline to exercise jurisdiction over Duquesne University of the Holy Spirit.

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Respectfully submitted,

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The undersigned hereby certified that a true and correct copy of the foregoing was filed electronically and copies were served via e-mail on the following on this the 19th day of June, 2015:

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